IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 13, 2005

ALLEN HODGKINSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Washington County
No. 25407 Robert Cupp, Judge

No. E2005-00254-CCA-R3-PC - Filed April 13, 2006

The petitioner, Allen Hodgkinson, appeals the Washington County Criminal Court's dismissal of his petition for post-conviction relief from his 1986 convictions for first degree murder and conspiracy to sell cocaine and resulting consecutive sentences of life imprisonment and twenty years. On appeal, the petitioner contends that he received the ineffective assistance of counsel because (1) his attorney denied him his right to testify, (2) his attorney failed to present critical evidence in the form of telephone records to support his claim that he had an ongoing business relationship with a co-defendant, and (3) his attorney failed to discuss his defense with him adequately during the trial. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID G. HAYES and JAMES CURWOOD WITT, JR., JJ., joined.

David F. Bautista, District Public Defender, and Ivan M. Lilly, Assistant Public Defender, for the appellant, Allen Hodgkinson.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General, pro tem; and Charles L. Murphy, Assistant District Attorney General, pro tem, for the appellee, State of Tennessee.

OPINION

This court summarized the facts of the case on direct appeal:

> The victim, Bobby Hensley, lived and worked in Asheville, North Carolina. In early 1986 Mr. Hensley asked James Hart to travel to Florida where he would purchase a kilo of cocaine from a prearranged source. Mr. Hart was to transport the cocaine back to Mr. Hensley in North Carolina. Hart testified it was his

understanding that Hensley had arranged to resell the cocaine to a person known as "Buddy" who lived in Johnson City, Tennessee.

Hart purchased the cocaine and delivered it to Hensley. On March 22, 1986, Hensley left North Carolina with the cocaine and arrived in Johnson City, Tennessee the same afternoon. Hensley checked into a local motel and shortly thereafter called the home of Franklin "Buddy" Humphreys. The call was received by an acquaintance of Buddy's, Richard Jones. Jones testified he had been recruited by Buddy to "ride" on a drug deal with Hensley for which he would be paid $1,000.00.

Jones and Humphreys went to Hensley's motel. Humphreys and Hensley talked briefly and Humphreys then left stating he was going to Myrtle Beach, South Carolina. Jones remained at the motel with Hensley.

Shortly after Humphreys departed Hensley made a telephone call. At the end of a brief conversation Hensley asked Jones to take him to "Allen's." The two men left the motel and went to the home of Allen Hodgkinson.

After arriving at Hodgkinson's trailer Hensley instructed Jones to go into the trailer and ask Hodgkinson for the money. Hensley remained in the car. Jones went into the trailer and spoke to Allen. Hodgkinson told Jones he did not have any money. Jones then insisted that Hodgkinson personally advise Hensley of this problem.

Hodgkinson and Jones left the trailer. Jones returned to the passenger seat of Hensley's car while Hodgkinson spoke to Hensley through the window of the driver's side. After a short exchange about the lack of money Hodgkinson turned to return to his trailer. According to Jones's testimony Hensley had become quite agitated at this point. Both Hensley and Jones were armed.

As Hodgkinson was heading back to his trailer shots were fired from the car. As a result of the gun fire Hensley was fatally wounded by a single shot to the head. Jones admits to firing the fatal shot but claims self-defense.

During the ensuing hours Hodgkinson and Jones attempted to locate Buddy Humphreys. When they learned Buddy had apparently

left for the beach they then covered Hensley's body with a blanket and decided to locate a friend, George Humphreys. Jones drove Hensley's car which contained Hensley's body and the cocaine to the home of Tommy Humphreys. Hodgkinson followed in his car. George Humphreys was found at Tommy's home.

After explaining to George Humphreys what had happened the three men, Richard Jones, Allen Hodgkinson, and George Humphreys, began to plan their next move. Throughout this time period the three men were drinking beer heavily. Without belaboring the events that followed it is sufficient to say the men eventually disposed of Hensley's body by binding him to cinder blocks and dumping the body in a nearby lake. The cocaine was removed from the car and hidden. Hensley's car was abandoned in a remote area where it was later discovered burned.

Hodgkinson, Jones and George Humphreys retained small samples of the cocaine for their personal use. The men drove around in Hodgkinson's car for several hours drinking beer and sampling the cocaine. In the early morning hours of March 23, 1986, Richard Jones was dropped off at a friend's house. Hodgkinson and George Humphreys were attempting to return to Hodgkinson's trailer when Hodgkinson became upset and jumped from the car. He ran to a nearby residence, pounded on the door, and began hysterically screaming "They are going to shoot me."

The sheriff's department was summoned and Hodgkinson was arrested. During this arrest George Humphreys drove past the scene. The officers followed the car and Humphreys was arrested for driving under the influence. As a result of the investigation following these two arrests the events of that evening began to unfold to the authorities. Richard Jones and Buddy Humphreys were arrested a few days later.

. . . .

. . . The state's theory of this case was that these defendants planned to ambush Hensley and take the cocaine. The state's evidence showing the murder/robbery scheme is circumstantial. The theory is based on the chain of events leading up to Hensley meeting with Jones and Hodgkinson. The fact no money was found with which to pay Hensley for the drugs is incriminating. No proof was offered to explain this curious break in the otherwise carefully

> planned drug deal. Both Hodgkinson and Jones participated in disposing of the victim's body and his car. Finally, both participated in taking the cocaine and hiding it. Even if the proof does not support the murder conspiracy theory it is clear the murder was committed and a robbery took place. These facts viewed together support the finding of murder committed in the perpetration of a robbery as to defendants Jones and Hodgkinson.

State v. Hodgkinson, 778 S.W.2d 54, 57-59 (Tenn. Crim. App. 1989).

On August 30, 1991, the petitioner filed a petition for post-conviction relief alleging that the trial court improperly instructed the jury, that the state engaged in prosecutorial misconduct, and that he received the ineffective assistance of counsel. On October 5, 1999, the Washington County Criminal Court entered an order appointing the petitioner counsel.[1] Thereafter, the petitioner's post-conviction counsel filed an amended petition alleging that the grand jury which indicted the petitioner was unconstitutionally formed.

At the post-conviction hearing, the petitioner's trial attorney testified that he visited the petitioner, who was incarcerated, several times before the trial. The attorney said he discussed issues regarding telephone records with the petitioner. He said he told the petitioner the telephone call the petitioner placed to one of the co-defendants on the day of the murder was going to be critical to the petitioner's case. The attorney said he learned that the petitioner called the co-defendants often because the petitioner worked with them.

The attorney said he attempted to suppress certain telephone records but was unsuccessful. He said the co-defendants testified to a long pattern of calls among all of the defendants. The attorney said that although the co-defendants' credibility was at issue,

> it was fairly common knowledge that they worked together as – as setting up the rock shows, and they called each other about transportation and, you know, shelter and hotel rooms when they'd go out on a job in the southeast. They covered about the whole southeastern district, as I recall.

The attorney acknowledged that the only evidence presented of the working relationship between the parties was the testimony of the co-defendants. The attorney admitted that although the state was focusing on one call, he did not attempt to introduce into evidence telephone records detailing a long history of calls between the petitioner and the co-defendants. The attorney said, however, that he "was satisfied that the jury knew that they had a working relationship and they made phone calls."

[1]The trial court's order noted that the petitioner's petition for post-conviction relief had been pending on the Washington County Criminal Court's docket for more than eight years.

The petitioner's attorney said he discussed the petitioner's right to testify with him before and during the trial. He said he originally thought the petitioner should testify but changed his mind after the testimony of the petitioner's co-defendants. He said he "saw that [petitioner's] only salvation was to not testify." He said that he advised the petitioner not to testify and that the petitioner took his advice. He said the petitioner never asserted that he wished to testify.

Richard Steven Jones testified that he was the petitioner's co-defendant. He said that on the last day of the trial during a break that occurred as he was testifying, he overheard the petitioner talking to his attorney. He said they were discussing the fact that the petitioner would be testifying next.

The petitioner testified that his prior record included only a domestic dispute but that he was not convicted of any crime. He said "the whole plan was for me to testify." He said, however, that after Mr. Jones testified, his attorney stood up and rested without calling him to testify. The petitioner said he wanted to testify, was prepared to testify, but was denied his right to testify because of his attorney's resting his case without telling him.

The petitioner testified that the prosecution's case was based upon proving the existence of the conspiracy through telephone records. He said the prosecution focused on telephone calls he placed to Mr. Humphreys. He claimed, however, that he never spoke to Mr. Humphreys on those occasions because he only got Mr. Humphreys' answering machine. The petitioner explained:

> Okay. Let me give you an example of what happened. We got close to the end of the trial. The DA comes to us and he said, I found ground breaking rules - - or news, or whatever it was. And he goes, I've got these phone calls which sets up the conspiracy. And he uses them words. He passed them all out where it showed Buddy Humphreys calling the guy they bought the drugs from, Buddy calling Mr. Jones, Mr. Jones calling the other guy that had the drugs. And then he pulls mine out and says, He's made six (6) phone calls in the last five (5) days to Buddy Humphreys. Well, when you get that out, Buddy Humphreys is never home. There isn't never me calling him. That's what set up the whole thing was saying we all called each other around this time of the drug deal. Well, I tried to get Mr. Boarman to get my phone records, to go back three (3) or four (4) years, which those happen to go back three (3) months. And you can see I called the guy an average of seventeen (17) to fifteen (15) times every month, not just what he tried to pick and choose here and break down and throw in the jury's face the last day or two of the trial.

The petitioner said his attorney never presented the telephone records indicating that he only reached Mr. Humphrey's answering machine. The petitioner said that "to the jury it looked like we were

sitting there calling up a big drug deal. But if you take my phone records, I never even talked to the man."

The petitioner testified that although the murder happened at his trailer, he was not responsible for killing the victim. He said Mr. Jones came to his trailer and asked for money. He said that when he told Mr. Jones he did not have any money, Mr. Jones asked him to go outside and tell the victim he did not have any money. The petitioner said, "I went outside and told him that, turned around and walked away, and that's when the shots were fired."

The petitioner said that after the murder, Mr. Jones asked him to help dispose of the victim's body. The petitioner said he was scared because Mr. Jones had just shot the victim. He said that Mr. Jones had a gun and that he did not. He said, "I just seen a man . . . get his brains blowed out. I wasn't arguing, questioning or nothing." He said Mr. Jones called Mr. Humphreys but could not reach him so he took the petitioner and the victim's body to the home of George Humphreys. He said that after they disposed of the victim's body, George Humphreys took him home but drove past his trailer. He said that at that point, he jumped out of George Humphreys' car as it was moving, ran to a house, and asked the residents to call the police.

After considering the evidence and the arguments of counsel, the trial court dismissed the petitioner's petition for post-conviction relief. The trial court accredited the testimony of the attorney and discredited the testimony of the petitioner regarding the issue of the petitioner's right to testify. The trial court found that in any event, the petitioner was not prejudiced based upon "overwhelming proof of the petitioner's participation in this homicide . . . ."

On appeal, the petitioner contends that he received the ineffective assistance of counsel. He claims his attorney's performance was constitutionally deficient (1) for denying him his right to testify, (2) for not introducing critical phone records into evidence, and (3) for not adequately discussing his defense with him during the trial. The state responds that the petitioner's attorney's performance was not constitutionally deficient and that the petitioner was not prejudiced.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather,

the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

I. FAILURE TO ALLOW PETITIONER HIS RIGHT TO TESTIFY

The petitioner contends that his attorney's performance was constitutionally deficient because his attorney did not allow him to testify. He claims that he intended to testify, that his attorney understood his intention, but that when it was time for his attorney to present his case, the attorney rested his defense. The state claims the petitioner was fully aware of his right to testify and chose not to do so after consulting with his attorney.

At the post-conviction hearing, the petitioner's attorney testified that he intended on having the petitioner testify but that after the testimony of the petitioner's co-defendants, he advised the petitioner not to testify. The petitioner testified that his trial attorney simply rested after the testimony of his co-defendants without consulting him. We conclude the record does not preponderate against the trial court's finding that the petitioner's testimony in this regard was incredible. The petitioner is not entitled to relief on this issue.

II. FAILURE TO INTRODUCE TELEPHONE RECORDS

The petitioner contends that his attorney's performance was constitutionally deficient for failing to introduce his telephone records. He claims that had his attorney introduced the records, the jury would have been able to consider the fact that the petitioner had regularly called Buddy Humphreys for a period of years. He argues that because of his attorney's inept performance, the jury was left with the impression that his contact with Buddy Humphreys was evidence of his involvement in the conspiracy to kill the victim and take his kilogram of cocaine. The state responds that the petitioner has failed to show prejudice. We agree with the state.

The record reflects that at the trial, myriad witnesses testified to the petitioner's involvement in disposing of the victim's body. Other witnesses testified to the petitioner's friendship and business relationship with his co-defendants. In this regard, the jury was fully aware of the petitioner's business relationship with the co-defendants. We conclude the petitioner has failed to carry his burden of establishing by clear and convincing evidence that he was prejudiced by his attorney's failure to introduce his telephone records into evidence. The petitioner is not entitled to relief on this issue.

III. FAILURE TO DISCUSS DEFENSE STRATEGY WITH PETITIONER

The petitioner contends that his attorney's performance was constitutionally deficient for failing to discuss a defense strategy with him. The state contends that the petitioner has failed to prove this allegation by clear and convincing evidence and that the petitioner has failed to show any resulting prejudice. We agree with the state.

At the post-conviction hearing, the petitioner's attorney testified that although he did not visit the petitioner in jail during the trial, he discussed the case with the petitioner each morning before the trial began. We note that although the trial court accredited the testimony of the attorney over that of the petitioner in other regards, it failed to address this contention in its order denying the petitioner relief. In any event, we conclude that the petitioner has failed to prove this allegation by clear and convincing evidence and that he is not entitled to relief on this issue.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE